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IN THE

Supreme Court of the United States

October Term, 1964

No. 528

GEORGETOWN GALLERIES, INC. AND HUNTINGTON CHAIR CORPORATION,
Bankrupts,

THOMAS J. WILSON, AS TRUSTEE IN BANKRUPTCY OF GEORGETOWN GALLERIES, INC. AND HUNTINGTON CHAIR CORPORATION,
Appellees,

v.

HY-LAN FURNITURE COMPANY, INC.,
Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, the Appellant above named, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on April 20, 1964; petition for rehearing being denied on June 25, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals denying the Petition to Rehear was not reported at the time of the preparation of this petition, however, it is set out in page 1 of the Appendix attached hereto.

The *per curiam* opinion of the Court of Appeals is reported in 332 F. 2d. 284 and is set out in page 1 of the Appendix attached hereto.

The opinion of the United States District Court for the Western District of North Carolina is reported as 223 F. Sup. 329 and is set out in pages 1 to 8 inclusive of the Appendix attached hereto.

JURISDICTION

The *per curiam* opinion of the Court of Appeals for the Fourth Circuit was entered April 20, 1964. The judgment of the Court of Appeals denying the Petition to Rehear was entered June 25, 1964. On August 3, 1964, Justice Herbert S. Boreman issued an Order extending the time to file this petition to September 23, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTION PRESENTED

Can two letters, not under oath, written to the Referee in Bankruptcy during the pendency of a Chapter XI arrangement by a creditor who first became a creditor subsequent to the filing of the Chapter XI arrangement, complaining of non-compliance of the contract agreement by the debtor and asserting that creditor would have a claim for damages, constitute a proof of claim in the ensuing bankruptcy proceeding after Chapter XI debtor is adjudged a bankrupt?

If the answer is in the negative, does the Referee in Bank-

ruptcy have the right to limit the time within which a creditor, who first became a creditor subsequent to the filing of a Chapter XI arrangement can file a proof of claim in the ensuing bankruptcy after a Chapter XI debtor is adjudged a bankrupt to a period less than the six months' allowance from the date of the First Meeting of Creditors as allowed by section 57 (n) of the Bankruptcy Act and Section 355 of the Bankruptcy Act.

STATUTES INVOLVED

The statutory provisions involved are the following sections of the Bankruptcy Act.

(a) Section 1 (11); 11 U.S.C.A. Section 1 (11)
(b) Section 1 (14); 11 U.S.C.A. Section 1 (14)
(c) Section 57 (a); 11 U.S.C.A. Section 93 (a)
(d) Section 57 (d); 11 U.S.C.A. Section 93 (d)
(e) Section 57 (n); 11 U.S.C.A. Section 93 (n)
(f) Section 63; 11 U.S.C.A. Section 103
(g) Section 302; 11 U.S.C.A. Section 702
(h) Section 352; 11 U.S.C.A. Section 752
(i) Section 355; 11 U.S.C.A. Section 755
(j) Section 381 (2); 11 U.S.C.A. Section 781 (2)
(k) Section 381 (3); 11 U.S.C.A. Section 781 (3)

They are printed in the Appendix hereto, pages 13 to 18 inclusive.

STATEMENT

The petitioner, Hy-Lan Furniture Company, Inc. first began its business relationship with Georgetown Galleries, Inc. and Huntington Chair Corporation during the pendency of a Chapter XI bankruptcy arrangement which had been filed by Georgetown Galleries, Inc. and Huntington Chair Corporation in the District Court of the United States for the

Western District of North Carolina which proceeding had been referred to the Honorable J. Harry Sample, Referee in Bankruptcy.

As a result of improper manufacturing and a breach of contract the petitioner wrote two letters to Referee Sample, during the pendency of the said Chapter XI arrangement complaining about the dissatisfaction with the performance of Georgetown Galleries, Inc. and Huntington Chair Corporation and advising that your petitioner, Hy-Lan Furniture Company, Inc. had a substantial claim for damages against them. Copies of said letters are set out in Appendix, pages 8 to 13 inclusive.

On February 14, 1963, Georgetown Galleries, Inc. and Huntington Chair Corporation were adjudged to be bankrupt. Written notice of the first meeting of creditors to be held on February 28, 1963 was mailed to the creditors and the interested parties.

Although your petitioner had not filed a Proof of Claim in the bankruptcy proceeding, the Referee in Bankruptcy issued a Show Cause Order against your petitioner based on a petition filed by the Trustee in Bankruptcy on April 12, 1963 why a judgment should not be entered against it for the amount claimed by the bankrupts.

On April 23, 1963 the Referee held a hearing pursuant to the Show Cause Order and ordered your petitioner to submit proof of its claim against the bankrupts within two weeks thereafter, which time limit was later extended to May 21, 1963. This order was entered notwithstanding that the six month period set out by Section 57(n) of the Bankruptcy Act within which your petitioner could file a Proof of Claim did not expire until August 27, 1963 six months from February 28, 1963, the date of the first meeting of the creditors in the bankruptcy proceedings.

No proof of claim being filed by your petitioner by May 21, 1963, the Referee entered a default judgment against your petitioner on May 25, 1964.

On June 12, 1963, a date within six months from the First Meeting of Creditors in the bankrupt proceeding, your petitioner filed its proof of claim.

On June 14, 1963 your petitioner filed a motion to set aside the "default judgment" entered by the Referee on May 25, 1963; on July 15, 1963 the Referee in Bankruptcy conducted a hearing on petitioner's motion to set aside the judgment of May 25, 1963; on July 16, 1963 the Referee entered an order disallowing petitioner's motion to set aside the "default judgment."

On July 24, 1963, your petitioner filed a motion for review of the Referee's order denying its motion to vacate and set aside the "default judgment." On November 5, 1963, after a hearing, the Hon. J. B. Craven, Jr., Chief Judge, U. S. District Court for the Western District of North Carolina entered a judgment sustaining the action of Hon. J. Harry Sample, Referee in Bankruptcy.

Your petitioner perfected an appeal to the U. S. Circuit Court of Appeals for the Fourth Circuit, who on April 20, 1964 entered a *per curiam* opinion sustaining the District Judge and on June 25, 1964 entered a judgment denying the Petition to Rehear from which action of the U. S. Circuit Court of Appeals for the Fourth Circuit a Writ of Certiorari is being sought.

REASONS FOR GRANTING THE WRIT

The issue presented is clearly one of importance in the administration of the Bankruptcy Act. Settlement of the question is plainly in the public interest as it is likely to arise in every case in which a debtor in a Chapter XI arrangement subsequently is adjudged a bankrupt.

While the petitioner has no official data available, it is believed that hundreds of cases are now pending which involve Chapter XI arrangements which may or have resulted in the Chapter XI debtor being adjudged a bankrupt. Therefore, the manner and time in which claims can be submitted by creditors who first become creditors during the pendency of the Chapter XI arrangement must be clarified or hopeless confusion will result.

The decision of the Trial Court which was sustained by the Court of Appeals is believed to be erroneous for the reasons given below.

Point I

It is patently clear that the Honorable J. B. Craven, Jr. District Judge, in his Order entered November 5, 1963, approving the actions of Referee Sample in treating the two letters from Mr. T. R. Earnest dated January 2, 1963 as Proof of Claims from and after the hearing of January 29, 1963 and in holding that the claim of the Appellant was duly filed in the Chapter XI proceeding prior to the entry of the Order directing bankruptcy is erroneous. Apparently, the District Judge confused the rights of a person who becomes a creditor for the first time during the pendency of a Chapter XI proceeding with those of a creditor whose relationship with the debtor existed at the time the petition for a Chapter XI arrangement was filed. This erroneous determination by Judge Craven being sustained by the Circuit Court in its *per curiam* opinion.

It is an undisputed fact that the Appellant is a creditor whose relationship with the bankrupt was established after the petition for a Chapter XI arrangement was filed and confirmed and before the date of the entry of the Order directing that bankruptcy be proceeded with.

A complete review setting forth the history and background of claims of creditors first arising after confirma-

tion and prior to the entry of the Order that bankruptcy be proceeded with is contained in *Vol. 9, Colliers,* § 10.19, pages 539 thru 547.

That recognized authority states that a claim arising after the filing of a Chapter XI petition is not provable during the administration of any proceeding under Chapter XI.

A creditor may not prove his claim in a bankruptcy proceeding unless it is of a category recognized as provable. Under the applicability provisions of § § 302 and 352 of Chapter XI the definition of "creditor" and the correlated definition of "debt" in § 1 (11), (14) of Chapter I apply for all purposes. Debts provable in Bankruptcy are enumerated in § 63.

The Appellant because of the limitation of § 63 could not prove its debt in the Chapter XI proceeding of the now bankrupt Georgetown Galleries, Inc. and Huntington Chair Corporation.

The rights of the Appellant as a creditor whose claim arose during the pending of the Chapter XI administration are set out in § 381 of the Bankruptcy Act, the applicable sections of which are as follows:

> Sec. 381. Where, after the confirmation of an arrangement, the Court shall enter an Order directing that bankruptcy be proceeded with—
>
> (1) * * *
>
> (2) the unsecured debts incurred by the debtor after the confirmation of the arrangement and before the date of the entry of the final Order directing that bankruptcy be proceeded with shall, unless and except as otherwise provided in the arrangement or in the Order confirming the arrangement, share on a parity with the prior unsecured debts of the same classes, provable in the ensuing bankruptcy proceeding, and for such purpose the prior unsecured debts shall be deemed to be reduced to the amounts respectively provided for

them in the arrangement or in the Order confirming the arrangement, less any payment made thereunder; and

(3) the provisions of Chapters I to VII, inclusive, of this Act, shall, insofar as they are not inconsistent or in conflict with the provisions of this section, apply to the rights, duties, and liabilities of the creditors holding debts incurred by the debtor after the confirmation of the arrangement and before the date of the final Order directing that bankruptcy be proceeded with, and of all persons with respect to the property of the debtor, and, for the purposes of such application, the date of bankruptcy shall be taken to be the date of the entry of the Order directing that bankruptcy be proceeded with.

Sub-division (3) of § 381 dealing with the rights, duties, and liabilities of creditors make the *focal* point the date of the entry of the Order directing bankruptcy. The provisions of Chapter I to VII covering all of the procedures applicable to a bankruptcy proceeding will be pertinent to the directed bankruptcy as of that date. *For example, the provisions regarding provability of claims will attach as of the date of the entry of the Order directing that Bankruptcy be proceeded with.* See *Vol. 9, Colliers*, § 10.19, page 546.

It is to be noted that the rights, duties and liabilities of creditors and other parties dealing with the debtor after the confirmation but before the Order directing bankruptcy are governed by the provisions of Chapter I to VII *only* as they are not inconsistent or in conflict with the provisions of Sec. 381

Therefore, the ruling of Referee Sample, dated May 25, 1963, limiting the time within which a Proof of Claim could be filed by the Appellant to a period less than six months from the date of the entry of the Order on February 14, 1963 directing bankruptcy cannot and should not be sustained. To do so would deprive the Appellant of its statutory

rights and amounts to a confiscation of its property without due process of law as guaranteed by the Constitution of the United States.

Thus it is clear that the Appellant had a period of six months from February 28, 1963, the date of the first meeting of creditors in the bankrupt proceeding, within which to file its Proof of Claim; that its Proof of Claim was filed on June 12, 1963, in this cause, within the statutory period has not been objected to and therefore must be considered before a final decision resolving the claims of both the bankrupt and Appellant can be adjudicated.

Thus the holding of the District Judge in his Order of November 5, 1963 that Appellant's proof was duly filed in the Chapter XI proceeding and therefore Appellant should not be allowed another opportunity to file its Proof of Claim after the entry of the Order directing bankruptcy cannot and should not be sustained by this Honorable Court.

The authority relied on by Judge Craven is *not* applicable to the instant case, namely:

> (1) *In re: Goodrich Manufacturing Co.*, 168 F. Supp. 940, 943 (D.C. Cal. 1956) decides a factual situation completely different from the case at bar. That case involved *creditors who were in existence* at the time of the original Chapter XI proceeding was instituted—NOT SO HERE. That case also cited for its clarity the *Senate Report No. 1935, 82nd. Congress 2nd. Sess. (1952) 4*; Section of that report as to creditors whose relationship begin *during* the Chapter XI proceeding is as follows:
>
> > "* * * And, further, so that the rights, duties, and liabilities of the creditors holding the new debts shall be subject to the straight bankruptcy provisions of the act, it is also provided that the provisions of Chapters I-VII of the act shall, to the extent applicable and not inconsistent or in conflict

with the provisions of the act, be applicable to such rights, duties, and liabilities; and, for such purposes, the date of the entry of the order directing bankruptcy is to be deemed the date of bankruptcy."

(2) *Collier on Bankruptcy, Vol. 8, § 355,* page 1006, (1962 Cumm. Supp.) *now Collier on Bankruptcy Vol. 9, § 355, page 88* (1963). This section relates to creditors in existence at the time the Chapter XI proceeding is instituted.

Point II

Appellant did not have a right to file a Proof of Claim in the Chapter XI proceeding, it not being an existing creditor, and the two letters of January 2, 1963 fall far short of the requirements needed in an instrument designed to be a Proof of Claim. These requirements are as follows:

(1) A statement under oath, signed by a creditor setting forth the claim.
(2) The consideration therefor.
(3) Whether any securities are held therefor.
(4) What payments have been made thereon, and
(5) That the claim is justly owing from the bankrupt to the creditor.

This Court's attention is directed to the case of *In re: Tashman, et al.*, 100 F. Supp. 799 (D.C. N.Y. 1951). In that case, the debtor was adjudicated a bankrupt when the Chapter XI proceeding failed. Certain creditors appeared and were examined in a § 21-A hearing, after bankruptcy and within the time proof of claims could be filed. They testified and submitted evidence of their claims during this hearing. Later, after time for filing proof of claims had expired, the Referee allowed the creditors to file written proof of claims, using the evidence and testimony of the 21-A hearing as the basis for allowing a proof of claim to be filed

after the time limitation, under the guise of amended proof of claims. *This was rejected by the Court,* stating that the Court did not possess the power to alter or revise the time limitations set by the Bankruptcy Act.

Thus Referee Sample could not alter the rights of the Appellant to file its proof of claim within six months after the adjudication of bankruptcy, and *could not shorten the period.*

See also *In re: Strikalite, Ltd.* D.C. 54 F Supp. 419 as to the minimum requirements of a Proof of Claim. Please compare the said letters of January 2, 1963 and an approved form of a proof of claim which are for convenience printed in the Appendix hereto.

These letters were filed prior to the Order directing that the Chapter XI proceeding be terminated and a bankruptcy proceeding begun. They can therefore have no legal force and effect in the ensuing bankruptcy proceeding for a creditor who was not a creditor when the initial Chapter XI proceeding was instituted.

There are no circumstances under which a letter of complaint relating to the manner in which debtor's business was being conducted filed in a Chapter XI proceeding before bankruptcy can be construed as a Proof of Claim in the Chapter XI proceeding before bankruptcy is directed. They were not Proof of Claims but merely statements of claims. Surely the Referee could not hold them to be other than normal monthly statements or complaints submitted to a debtor operating his own business by any of its creditors, yet, that is precisely what is being attempted in this instance. It is without question that they were not contended as Proof of Claims, the business entity against whom they were presented was not even a bankrupt at that time but was a debtor in possession, a business to be dealt with in the same manner as any other normal operating business.

Point III

The Trustee relied on the following cases to show that the Referee in Bankruptcy had summary jurisdiction to adjudicate the matter on April 23, 1963 including the right to render an affirmative judgment. The case at Bar is easily and readily distinguished from those cases.

The Trustee, the Referee and Judge Craven overlook the salient fact that the reference in *Collier*, Vol. 2, page 545, Foot Note 51; in *Florance* v. *Kresge* (C.C.A. 4th, 1938) F 2d. 784, *Continental Casualty Company* v. *White*, C. C.A. 4th, 1959) 269 F. 2d. 213 and *In re: Petroleum Conversion Corp.* (D.Del., 1951) 99 F. Supp. 899 all interpreted factual situations wherein an existing creditor at the time of adjudication of bankruptcy subsequently filed a Proof of Claim in the bankruptcy proceeding.

That factual situation does not exist here. In fact, the contrary exists; Appellant not being a creditor at the filing of the petition of the Chapter XI had not filed its Proof of Claim on May 25, 1963 at the time the default judgment of Referee Sample was entered.

It is important to this Court to understand that the Trustee, himself, forced this situation by making application by petition to the Referee in Bankruptcy to compel Hy-Lan Furniture Company to file a Proof of Claim. There is no such power in the Bankruptcy Act and it was this position that brought about the injustices complained of to this Honorable Court.

Point IV

When viewed in the analytical light required in analyzing the rights of parties in a subsequent bankruptcy proceeding who had first become creditors of the bankrupt during the

Chapter XI proceeding, the Referee in Bankruptcy is not allowed and is without authority to diminish the creditor's statutory right to file its Proof of Claim within six months of the first meeting of the creditors in the bankruptcy proceeding.

Thus the validity or invalidity of the reasons extended by Mr. Edward J. Brady, Attorney for Appellant, for the non-compliance with the Order of the Honorable J. Sample, Referee in Bankruptcy, that Appellant file its Proof of Claim within two weeks of April 23, 1963 and later extended to May 21, 1963 is of no significance when this Order is exposed to the light of these statutes. The Referee was without authority to limit this statutory right.

"Nunc pro tunc" filing of a proof of claim against the bankrupt estate is not authorized. See *In re: Tishman, et al., supra.* Therefore, the conduct of Appellant's attorney, Mr. Edward J. Brady, could not amount to the filing of a proof of claim on April 23, 1963. There was no written proof of claim filed on April 23, 1963 conforming to the requirements of the Bankruptcy Act.

The Referee could only direct and limit the time to prove the allowability of a claim after said claim had first been proven: i.e. proven meaning filed in the bankruptcy proceeding.

Point V

A Bankruptcy Court sits as a Court of Equity. See *Florance v. Kresge, supra.* It is in the interest of Justice and in the interest of protecting Appellant's constitutional rights that Appellant be not deprived of its property except by due process of law and that your Appellant have its day in Court where its claims as set out in the Proof of Claim filed on June 14, 1963 can be resolved and adjudicated with those claims and allegations asserted by the Trustee. Certainly a fair-minded Chancellor could not do otherwise.

The Appellant dealt with the debtor in good faith and expected the debtor would carry on its business and would continue to manufacture furniture. On January 2, 1963 when the letters were written and erroneously considered by the Referee and the District Judge as Proof of Claims there was no expectation on the part of the Appellant that the now bankrupt would fail to carry on their obligations in connection with their orders from Appellant.

Therefore the rights of the Appellant should not be diminished as they would be if the erroneous interpretation of Judge Craven in his Order of November 5, 1963 interpreting § 57 (n) were allowed to stand. This is a matter of law that can and should be decided by this Honorable Court and does not occupy the status of a "Finding of Fact" by the District Judge.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated September 22, 1964.

Respectfully submitted,

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CERTIFICATE OF MAILING

Copy of the foregoing Petition for Writ of Certiorari was served on the Appellee by mailing the same, air mail postage-prepaid, to Thomas J. Wilson, Lincolnton, North Carolina and W. F. Womble, Wachovia Bank Building, Winston-Salem, North Carolina, Appellee's counsel of record, all on the 23rd day of September, 1964.

ROBERT CANTOR
ROBERT R. JONES

CERTIFICATE OF COUNSEL

We, Robert Cantor and Robert R. Jones, Counsel for Petitioner, Hy-Lan Furniture Company, Inc., Appellant, do hereby certify that the foregoing Petition for Writ of Certiorari has been filed with the Court in good faith and not for purposes of delay.

ROBERT CANTOR
ROBERT R. JONES

Order of C.C.A. 4th Circuit Entered June 25, 1964 Denying Petition to Rehear

By its Petition for Rehearing filed herein on May 19, 1964, Hy-Lan Furniture Company, Inc., seeks to recast the issues which were raised in the court below and which were presented before us on appeal. Upon consideration, it is

ORDERED that the Petition for Rehearing be, and the same is hereby, denied.

June 22, 1964

Per Curiam Opinion, C.C.A. 4th Circuit Entered April 20, 1964 (332 F. 2d 284)

PER CURIAM:

Hy-Lan Furniture Company, Incorporated asserts that it was not afforded an adequate opportunity to present proof of its claim in this bankruptcy proceeding. The District Court determined that two letters written January 2, 1963 by Hy-Lan to the Referee constituted proof of claim. The issue of Hy-Lan's opportunity to furnish further proof primarily raises a question of fact.

Consideration of the record, briefs and arguments persuades us that the District Judge properly affirmed the order of the Referee disallowing Hy-Lan's claim in part. The District Judge did not abuse his discretion by denying Hy-Lan's motion to vacate the Referee's order and to re-open the proceedings for further proof.

Affirmed.

Opinion of U. S. District Court for the Western District of North Carolina Entered November 5, 1963 (223 F. Sup. 320)

CRAVEN, Chief Judge:

The record and counsels' briefs disclose the following chronological sequence of events:

May 14, 1962: Georgetown Galleries, Inc. and Huntington Chair Corporation filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. (11 U.S.C.A. Section 701, et seq.) The matter was referred to the Referee in Bankruptcy.

October 31, 1962: The initial meeting of creditors was conducted before the Referee.

January 2, 1963: Two letters bearing this date and signed by Mr. T. R. Earnest, Vice-President of Hy-Lan Furniture Company, Inc. were received by the Referee. (Hy-Lan is indebted to Huntington Chair Corporation in the amount of $41,911.63 representing the purchase price of 6,500 chairs.) One letter claimed that many of the chairs for which Hy-Lan was indebted to Huntington had been found to be defective and that Hy-Lan could not settle its account with Huntington because it did not yet know the exact material loss it might sustain on account of the defective chairs. It was stated in the other letter that Huntington had breached a contract made with Hy-Lan to manufacture and deliver to Hy-Lan certain bedroom furniture and that "the eventual amount of damages that conceivably could be sustained by (Hy-Lan) cannot be computed at this time, but we have substantial reason to believe that it would probably run into several hundred thousand dollars." The Referee in Bankruptcy treated these letters as proof of claims on behalf of Hy-Lan.

January 29, 1963: A hearing was conducted by the Referee at which Mr. T. R. Earnest testified fully with respect to the claims set out in the above mentioned letters. It was indicated by the Referee during the course of Mr. Earnest's testimony that the two letters had been entered in the proceedings as proof of claims. (Tran. p. 36). Mr. Earnest testified that the amount of

Hy-Lan's claim was still undeterminable at that point. (Tran. p. 26). He was directed by the Referee to supply certain information bearing upon the liquidity of the claim. (Tran. p. 50).

February 14, 1963: Georgetown Galleries, Inc. and Huntington Chair Corporation were adjudged to be bankrupt. Written notice of the first meeting of creditors, to be held February 28, 1963, was given all creditors and other interested parties.

February 28, 1963: The first meeting of creditors of the bankrupts—Georgetown Galleries, Inc. and Huntington Chair Corporation—was held before the Referee in Bankruptcy. Hy-Lan was represented by counsel at the meeting. No discussion ensued, however, relating to its claim.

April 12, 1963: The Trustee in Bankruptcy petitioned the Referee to reject and disallow the claims filed by Hy-Lan, in the form of the letters above mentioned, and to order Hy-Lan, to pay over to the bankrupts' estate the $41,911.63 owed it for the 6,500 chairs, less the reasonable cost of refinishing 200 of the chairs. An order to show cause why this petition should not be allowed was issued by the Referee and served upon Hy-Lan.

April 23, 1963: A hearing pursuant to the show cause order was held before the Referee in Bankruptcy. At the hearing the Referee allowed Hy-Lan two weeks within which to submit proof of its claim; before the two-week period expired, the Referee extended the allowable period to and including *May 21, 1963.*

May 25, 1963: Hy-Lan having failed to file further proof of its claims within the time allowed, the Referee

signed a "judgment" making these findings of fact and conclusions of law:

1. The claim of Hy-Lan for damages suffered by reason of Huntington's breach of a contract to manufacture and deliver bedroom furniture is not supported by evidence. There were preliminary negotiations looking toward the possibility of such a contract, but no legally binding agreement was ever entered into by the parties.

2. The evidence does not support Hy-Lan's claim that so many of the 6,500 chairs delivered to it by Huntington were so defective that the ultimate damage to Hy-Lan by reason thereof equals or exceeds the $41,911.63 owed by Hy-Lan to Huntington on the purchase order therefor. It is agreed that the first 200 chairs delivered required refinishing; no agreement was ever reached as to the cost of refinishing. The total purchase price of these 200 chairs was $2,200.00. Immediately following delivery of the first 200 chairs, Hy-Lan placed one of its own employees in the Huntington plant to inspect the remainder of the chairs manufactured under the purchase order; Hy-Lan accepted delivery of the additional 6,300 chairs after inspection by its employee or opportunity therefor. As of January 29, 1963, a total of five of these chairs had been returned to Hy-Lan by purchasers. All but 794 of the chairs had been sold by February 12, 1963.

3. The cost of refinishing the first 200 chairs and Hy-Lan's right to a credit therefor could not exceed their purchase price, $2,200.00.

4. Conclusions of Law:

   (a) Hy-Lan had no contract with the bankrupts

relative to the manufacture of bedroom furniture and, therefore, has no claim for damages for breach thereof.

(b) Hy-Lan is liable for the purchase price of the chairs delivered to it by Huntington.

(c) Hy-Lan is obligated to pay $41,911.63 for the 6,500 chairs less the reasonable cost of refinishing 200 of them, the latter amount not to exceed $2,200.00.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Hy-Lan's claim arising out of an alleged contract with bankrupts for the manufacture of bedroom furniture is rejected and disallowed.

2. Hy-Lan's claim arising out of alleged defects in all or a part of the 6,500 chairs purchased from bankrupts is rejected and disallowed.

3. Hy-Lan is ordered and directed to pay over to Trustee in Bankruptcy $39,711.63 plus interest at the rate of six per cent per annum from December 31, 1962.

4. The determination of the reasonable cost of refinishing the first 200 chairs is left open and the Trustee in Bankruptcy is directed to file with the Referee evidence pertaining to such cost on or before June 15, 1963. Any of the parties may request an oral hearing on the question of such cost; if no request is made for a hearing, the Referee will determine the reasonable cost of refinishing the first 200 chairs on the basis of written evidence.

/s/ J. HARRY SAMPLE,
Referee in Bankruptcy

June 12, 1963: Hy-Lan Furniture Company, Inc. filed a formal proof of claim for $409,077.78.

June 14, 1963: Hy-Lan filed a motion to set aside the "default judgment" signed by the Referee May 25, 1963.

July 15, 1963: The Referee in Bankruptcy conducted a hearing on Hy-Lan's motion to set aside the "judgment" of May 25, 1963.

July 16, 1963: The Referee in Bankruptcy entered an order disallowing Hy-Lan's motion to set aside the "default judgment."

July 24, 1963: Hy-Lan filed a petition for review of the Referee's order denying its motion to vacate and set aside the "default judgment."

RULING AND OPINION OF THE COURT

The court having heard counsel in argument upon Hy-Lan's motion to set aside the "default judgment" entered by the Referee May 25, 1963, and having reviewed the record and applicable law in this matter, is of the opinion that the Referee's order denying Hy-Lan's motion to set aside the "default judgment" must be sustained.

The two letters from Mr. T. R. Earnest dated January 2, 1963, and addressed to the Referee in Bankruptcy substantially comply with the requirements of Section 57 (a) of the Bankruptcy Act (11 U.S.C.A. Section 93 (a).) so as to constitute recognizable proof of claims. The Referee properly treated them as such—certainly from and after Mr. Earnest's testimony at the hearing of January 29, 1963.

Hy-Lan was seeking to have allowed *contingent, unliquidated claims*. Section 57 (d) of the Act (11 U. S. C. A. Section 93 (d) clearly and distinctly provides:

> That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner *and within the time directed by the court;* and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act. (Emphasis added.)

The Referee allowed Hy-Lan a total period of time beginning April 23, 1963, and ending May 21, 1963, within which to reduce its claim to one of certainty and liquidity, and Hy-Lan failed to timely respond to the opportunity so granted. Indeed, Hy-Lan did not even come forth with an *estimate* of the amount of its claim. The above quoted portion of the Bankruptcy Act is clear and unequivocable; just as clear is the fact that Hy-Lan neither liquidated its claim nor estimated the amount thereof "within the time directed by the court." Entry by the Referee, therefore, of the order of May 25, 1963, disallowing the claims of Hy-Lan (except to the extent that some degree of certainty was indicated relative to the reasonable cost of refinishing the first 200 chairs) was unquestionably within the framework of the Bankruptcy Act and necessary to the expedient administration of the estate

Hy Lan cannot now avail itself of Section 355 (as amended 1952) of the Bankruptcy Act (11 U.S.C.A. Section 755, as amended 1952). The effect of that provision is that when an arrangement attempt under an original Chapter XI petition fails and an order is entered directing that bankruptcy be proceeded with, "*claims not already duly filed*" may be filed within six months after the first date set for the first meeting of creditors in the *bankruptcy* matter. See: *Collier on Bankruptcy*, Vol. 8, Section 355, p. 1006, (1962 Cumm. Supp.); *In re Goodrich Manufacturing Co.*,

168 F. Supp. 940, 943 (D. C. Cal. 1956). Hy-Lan's proof of claims *was* "duly filed" in the Chapter XI proceeding prior to the entry of the order directing bankruptcy, hence, the above cited section of the Act cannot and should not be construed to allow it a *second* opportunity to file proof of claims.

Such of Hy-Lan's contentions in its petition for review as are not touched upon in this opinion have been considered by the court and are deemed to be without merit.

The order of the Referee in Bankruptcy disallowing and rejecting the claims of Hy-Lan Furniture Company, Inc. is affirmed; Hy-Lan's motion to vacate said order is denied.

This 5th day of November, 1963.

/s/ J. B. CRAVEN, JR.

Copy of Two Letters Dated January 2, 1963 Sent by Petitioner to Referee in Bankruptcy During Pendency of Chapter XI Arrangement

Honorable J. HARRY SAMPLE,
Referee in Bankruptcy
206 Post Office Building
Charlotte, North Carolina

and

Mr. JOHN CATRANIS
Administrator for the Referee
Lincolnton, North Carolina

Re: GEORGETOWN GALLERIES, INC.
and
HUNTINGTON CHAIR CORPORATION

Gentlemen:

This is to advise that we have suffered damages by reason of non-compliance of Huntington Chair Corporation in its

contract to manufacture and deliver to us bedroom furniture as agreed upon in those certain articles of agreement hereinafter referred to.

Hy-Lan Furniture Company is primarily engaged in the manufacture of dining room furniture, and due to the constant request of our selling agents and customers, we have long been desirous of adding bedroom furniture to our line. Many months ago as a result of several conferences with Mr. John Catranis, Administrator for the Referee and in charge of operations of the above company for creditors, and Mr. Jules Bachrach, President of Huntington Chair Corporation, which was then and there under the control and operation of the United States District Court in Bankruptcy, with an order to continue the operation of said plant by said Court, it was agreed that Huntington would manufacture bedroom furniture for Hy-Lan Furniture Company on a continuing basis and under the terms, conditions and specifications agreed to thereon.

On the basis of this agreement with Huntington Chair Corporation, as aforesaid, a designer was employed and said designer, with one of our leading sales agents, three members of our Hickory staff and a representative of our New York Office, spent several days at the Huntington plant in Lincolnton, North Carolina, designing and developing a suite to be manufactured by Huntington which would be acceptable to all parties concerned. Subsequent thereto, Huntington made a sample cutting in accordance with our agreements and specifications heretofore set forth, and sketches of said design were sent to our sales agent, and thereupon agreement was made with said agent for handling this line based on the sketches submitted and the sample work accomplished. That thereupon, based on the foregoing, agreement made with the sales agent by our New York Office for handling this line, considerable furniture was actually sold by said agent, with

deliveries to be made at the end of the year 1962 and the beginning of the year 1963.

We are advised that at a subsequent meeting in our New York Office with Messrs. Catranis and Bachrach, that Mr. Bachrach suggested that we order materials and necessary supplies for the production of the initial cutting of these suites, since Huntington's credit at this time was not of sufficient substance to warrant their being able to purchase this material, and further suggested that materials so purchased would be used as a credit which would be applied on our account with Huntington.

Now Huntington refuses to manufacture this bedroom suite for us as agreed upon, and also refuses to accept the materials which we had purchased for this purpose, consisting of carloads of lumber and other materials. Therefore we are placed at a severe disadvantage in the market and find ourselves in serious difficulties with our sales agent who relied on our representations.

Mr. Yale Sakolsky, our sales agent in New York, has represented to us that his company could sell approximately $2 million, more or less, of bedroom furniture a year, and has committed themselves to our New York Office that they would sell $1 million a year minimum, and based on their commission of six (6%) percent they have advised us that they are looking to us for remuneration of the loss of commission of $60,000.00 a year for the next ten (10) years, which was the terms of and arrangement with the New York Office. We are further advised that Mr. Sakolsky's firm has actually sold and now has firm orders for a substantial portion of their first year's commitments, and are now looking to us for recompense for sales that they have been deprived of which could have been made on bedroom furniture from the other manufacturers they represent. This bedroom suite was designed to be a companion suite for the Hy-Lan No. 110

dining room suite, and as a result of the non-compliance on the part of Huntington, our agents are now losing sales on the dining room suites as heretofore set forth.

If the reorganization is completed, as we are advised it would be, the eventual amount of damages that conceivably could be sustained by us cannot be computed at this time, but we have substantial reason to believe that it would probably run into several hundred thousand dollars.

Yours very truly,

HY-LAN FURNITURE COMPANY, INC.
T. R. EARNEST
T. R. EARNEST, Vice-President

January 2, 1963

Honorable J. HARRY SAMPLE,
Referee in Bankruptcy
206 Post Office Building
Charlotte, North Carolina
and
Mr. JOHN CATRANIS
Administrator for the Referee
Lincolnton, North Carolina

Re: GEORGETOWN GALLERIES, INC.
and
HUNTINGTON CHAIR CORPORATION

Gentlemen:

We have previously advised the above named parties on various occasions that the chairs which were manufactured for us, as a result of an agreement heretofore made, are defective, and therefore not generally acceptable in the trade. These chairs, which were received by us in cartons were not

uncrated, but instead were sent on direct to our customers and have, in many instances, been rejected and are now being returned on account of said defects which, according to our customers, cannot be used by them.

Upon inspection of the chairs which have been returned, and further inspection of the chairs in stock which have been manufactured and delivered by the above named parties, we have noted, as an example, that the stretchers on the chairs are too short and will not stay in place once they are in constant usage. In normal utility of these chairs in the customer's home, sufficient stress would be employed to break the glue joint, and once this is done these stretchers will work loose, causing continuous trouble and annoyance to the customer. It is further noted that in many instances the finish on these chairs is not up to our standard or the grade agreed upon, which is also a source of complaint.

After the initial running of these chairs we noticed immediately that they were not satisfactory, and both Mr. Catranis and Mr. Bachrach were advised of this and in order to cooperate with the manufacturer we sent an observer to the Huntington Plant to observe these chairs during the process of manufacture. The observer noted the finished production of these chairs and made comments to the supervisory employees of Huntington, and expressed his opinion as to what he felt would be needed to improve the production, although he had no authority to enforce these suggestions. This observer was not present at all times during the manufacture of these chairs, but in several instances he noticed that chairs which he had heretofore stated were not acceptable were placed in cartons for shipment. We relied on Huntington's past reputation and know-how to give us chairs of like quality and construction commensurate to the sample which we had provided, and which they agreed to manufacture a product in like manner.

We now find a situation which places us at a severe disadvantage. Chairs are being returned to us and complaints are being made by customers who refuse to pay us for these goods in view of the fact that the merchandise that they have purchased does not meet the standards as heretofore represented. We sold these chairs as part of an entire dining room suite, and from the nature of the complaints we are now receiving, the entire dining room suites will be returned to us on account of the faulty nature of the chairs which has been heretofore set out.

The Huntington Chair Corporation has heretofore acknowledged that a few hundred of these chairs are defective, and this disturbing element has been confirmed to us in a letter from William Iselin & Company, the factors for Huntington Chair Corporation.

We trust that under the circumstances you will understand that we cannot settle our account with Huntington Chair Corporation, inasmuch as we do not know the exact material loss which we may sustain by the aforementioned defects in chairs, and the results therefrom. However, we have every reason to expect at the present writing that our loss will exceed many times the amount of invoices submitted to us by Huntington, to say nothing of the loss of prestige, good will and dealer confidence in the Hy-Lan name which could be caused in the general market.

Yours very truly,

HY-LAN FURNITURE COMPANY, INC.
T. R. EARNEST
T. R. EARNEST, Vice-President

Pertinent Sections of the Bankruptcy Act

§1 (11), (14) Bankruptcy Act (11 USCA §1 [11, 14])

(11) "Creditor" shall include anyone who owns a debt demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

§ 57 (a) (d) (n) (11 USCA § 93 [a] [d] [n])

(a) A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor.

(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: Provided, however, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.

(n) Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before

the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: Provided further, That, except in proceedings under chapters X, XI, XII, and XIII of this Act, the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer: And provided further, That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

§63 (a) (b) (c) (d) (11 USCA §103 (a) (b) (c) (d))

(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a bankrupt who was at the time of the filing of the petition by or

against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a probable debt; (4) an open account or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication; (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; (8) contingent debts and contingent contractual liabilities; or (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property; Provided, however, That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued, without acceleration, up to such date: And provided further, That in the case of an assignment of any such claim for damages, the court shall, in determining the amount thereof, examine the circumstances of the assignment and the consideration paid or to be paid therefor, and may allow the claim of the as-

signee, in such amount, subject to the provisions of the foregoing proviso of this clause (9), as will be fair and equitable.

b) In the interval after the filing of an involuntary petition and before the appointment of a receiver or the adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate shall be provable to the extent of the value of such property or services.

c) Notwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition in bankruptcy, or of the original petition under chapter X, XI, XII, or XIII of this Act.

d) Where any contingent or unliquidated claim has been proved, but, as provided in subdivision d of section 57 of this Act, has not been allowed, such claim shall not be deemed provable under this Act.

§302 (11 USCA §702)

The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors" and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of

adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act, except where an adjudication had previously been entered.

§355 (11 USCA §755)

Where a petition is filed under section 322 of this Act, subdivision n of section 57 of this Act shall apply.

§381 (2)(3) (11 USCA §781 [2] [3])

(2) The unsecured debts incurred by the debtor after the confirmation of the arrangement and before the date of the entry of the final Order directing that bankruptcy be proceeded with shall, unless and except as otherwise provided in the arrangement or in the Order confirming the arrangement, share on a parity with the prior unsecured debts of the same classes, provable in the ensuing bankruptcy proceeding, and for such purpose the prior unsecured debts shall be deemed to be reduced to the amounts respectively provided for them in the arrangement or in the Order confirming the arrangement, less any payment made thereunder, and

(3) the provisions of Chapters I to VII, inclusive, of this Act, shall, insofar as they are not inconsistent or in conflict with the provisions of this section, apply to the rights, duties, and liabilities of the creditors holding debts incurred by the debtor after the confirmation of the arrangement and before the date of the final Order directing that bankruptcy be proceeded with, and of all persons with respect to the property of the debtor, and, for the purposes of such application, the date of bankruptcy shall be taken to be the date of the entry of the Order directing that bankruptcy be proceeded with.

Example of Approved Form for a Proof of Claim

B.K.-28a (Rev. August '61)

UNITED STATES DISTRICT COURT
FOR THE

.....

In the matter of

(Important—Insert name of bankrupt or debtor above).

In Bankruptcy

No. .....

PROOF OF CLAIM IN BANKRUPTCY

....., of No. ..... Street,
in ..... (City), County of ....., State of ....., says:

IF CLAIMANT IS AN INDIVIDUAL:

1 *(a)* That he is the claimant herein.

IF CLAIMANT IS A PARTNERSHIP:

1 *(b)* That he is a member of ....., a copartnership, composed of the undersigned and ....., of ....., in the County of ....., State of ....., and carrying on business at No. ..... Street, in ..... (City), County of ..... State of .....

IF CLAIMANT IS A CORPORATION:

1 *(c)* That the undersigned is the ..... (Official title) of ..... (Creditor), a corporation organized under the laws of the State of ....., and carrying on business at No. ..... Street in ..... (City), County of ....., State of ....., and is duly authorized to make this proof of claim on its behalf.

IF MADE BY AGENT OR ATTORNEY:

1 *(d)* That the undersigned is the agent or attorney of ..... (Creditor), of No. ..... Street, in ..... (City), County of ..... State of ....., that he is duly authorized by said ..... to make this proof of claim in his behalf; that said proof cannot be made by said ..... (Creditor) in person because .....

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to the claimant (or copartnership or corporation), in the sum of ..... dollars ($ .....).

3. That the consideration of this debt (or liability) is as follows:

4. That no part of the debt (or liability has been paid except

5. That there are no set offs or counterclaims to the debt (or liability) except

at No. ..... Street, in ..... (City), County of .....

State of .....

IF CLAIMANT IS A CORPORATION:

1 *(c)* That the undersigned is the ..... (Official title) of ..... (Creditor), a corporation organised under the laws of the State of ....., and carrying on business at No. ..... Street in ..... (City), County of ....., State of ....., and is duly authorized to make this proof of claim on its behalf.

IF MADE BY AGENT OR ATTORNEY:

1 *(d)* That the undersigned is the agent or attorney of ..... (Creditor) of No. ..... Street, in ..... (City), County of ..... State of ..... ; that he is duly authorized by said ..... (Creditor) to make this proof of claim in his behalf; that said proof cannot be made by said ..... (Creditor) in person because .....

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to the claimant (or copartnership or corporation), in the sum of ..... dollars ($).

3. That the consideration of this debt (or liability) is as follows:

4. That no part of the debt (or liability has been paid except

5. That there are no set-offs or counterclaims to the debt (or liability), except

6. That claimant (or said copartnership or said corporation) does not hold, and has not, nor has any person by his or (its) order, or to the knowledge or belief of the undersigned for his (or its) use, had or received, any security, or securities for the debt (or liability), except

7. [If the debt or liability is founded upon an instrument of writing.] That the instrument upon which the debt (or liability) is founded is attached hereto (or lost or destroyed, as set forth in the affidavit attached hereto.)

8. [If the debt is founded upon an open account.] That the said debt was (or will become) due on ..... (or that the average date thereof is ..... ; that no note, or other negotiable instrument, has been received for such account, or any part thereof (or that the said debt is evidenced by a note, or other negotiable instrument, which is attached hereto; and that no judgment has been rendered thereon, except .....

9. This claim is filed as an { UNSECURED / SECURED / PRIORITY } CLAIM

Dated at ....., this ..... day of 19

Signed .....

(Name of individual, agent, officer, or partner signing this claim)

PENALTY FOR PRESENTING FRAUDULENT CLAIM. — Fine of not more than $5,000 or imprisonment for not more than five years or both — Title 18, U.S.C., §152.

(When signed mail this proof of claim to Referee in Bankruptcy)

BRIEF IN OPPOSITION TO PETITION FOR WRIT

COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 13 1964
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 528.

GEORGETOWN GALLERIES, INC. AND HUNTINGTON CHAIR CORPORATION,
Bankrupts,

THOMAS J. WILSON, as Trustee in Bankruptcy of GEORGETOWN GALLERIES, INC. and HUNTINGTON CHAIR CORPORATION,
Appellees,
Respondent.

v.

HY-LAN FURNITURE COMPANY, INC.,
Appellant,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. WILSON
First National Bank Building
Lincolnton, North Carolina

WOMBLE, CARLYLE, SANDRIDGE & RICE
723 Wachovia Bank Building
Winston-Salem, North Carolina
Attorneys for Respondent

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In The

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October Term, 1964

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Appellees,
Respondent.

v.

HY-LAN FURNITURE COMPANY, INC.,
Appellant,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, Thomas J. Wilson, Trustee in Bankruptcy of Georgetown Galleries, Inc. and Huntington Chair Corporation, respectfully files this brief in opposition to the Petition of Hy-Lan Furniture Company, Inc. for a writ of certiorari, on the following grounds:

1. The questions presented by Petitioner (pages 2 and 3 of petition) were not the questions before the Court of Appeals, nor are they properly before the Supreme Court.

2. There is no special or important reason for granting a writ of certiorari in this case.

STATEMENT OF THE CASE

In the fall of 1962, during the Chapter XI proceedings, bankrupts manufactured 6500 chairs for (and delivered them to) Petitioner (Hy-Lan), for which Petitioner owed bankrupts $41,911.63, less the cost of refinishing 200 of the 6500 chairs. (This is not disputed; note the following excerpt from p. 24 of the transcript of the October 23, 1963, hearing before Judge Craven, at which time Mr. Brady was appearing for Petitioner:

> "COURT: "I'll just take it up one at a time. As far as the $41,000 item, is it fair to say that you do owe that subject to the claim you made with respect to 200 chairs being defective?
>
> "MR. BRADY: Right.")

A plan of arrangement was submitted to bankrupts' creditors. Shortly before the Referee was to pass upon the sufficiency of the number and amount of those who had

approved the plan. Petitioner, on January 2, 1963, wrote the two letters appearing on pages 8 and 11 in the appendix to Petitioner's Petition for Writ of Certiorari. These letters were addressed to both the Referee and the Court-appointed administrator of the bankrupts' operations. One related to the 6590 chairs; the other to an alleged contract to make bedroom furniture. Both referred to substantial losses in undetermined amounts. The timing of the letters raised a strong suggestion that they might be part of an effort to defeat the proposed plan of arrangement. (Later, at the bankruptcy sale, an affiliate of Hy-Lan bought the assets of the bankrupts). The Referee understood that the Petitioner intended for the letters to be considered as proofs of claim (R. p. 30. Hearing before Referee, January 29, 1963), and on January 29, 1963, the Referee held a hearing at which T. R. Earnest, Petitioner's officer who had written the letters, was examined under oath about the details of the claims. Mr. Bircham, the bankrupts' plant superintendent, was also examined concerning the manufacture and delivery of the 6500 chairs. These examinations were transcribed and incorporated in the Referee's records. On February 14, 1963, Georgetown Galleries, Inc. and Huntington Chair Corporation were adjudged to be bankrupt, and their physical assets were sold at auction by the Trustee. Petitioner (Hy-Lan) refused to pay to the Trustee its debt of $41,911.63 for the 6500 chairs, or any part thereof. In order to expedite settlement of the claims made in the January 2, 1963, letters and bankrupts' $41,911.63 claim against Petitioner, the Trustee petitioned the Referee to reject and disallow Petitioner's (Hy-Lan's) claims (which were contingent, unliquidated and appeared to the Trustee to be unfounded) and to order Petitioner to pay over to

bankrupts' estate $41,911.63, owed for the 6500 chairs, less the reasonable cost of refinishing 200 chairs, which bankrupts agreed required refinishing (all except the first 200 chairs had been personally inspected and passed by Petitioner's representative at bankrupts' plant as brought out in the January 29, 1963, hearing). The Referee scheduled a hearing for April 23, 1963, for Petitioner to show cause why the prayer of the Trustee should not be granted. The Petitioner appeared at the hearing prepared to challenge the jurisdiction of the Referee to hear the matter, but not to consider the matter on the merits. In the course of the hearing counsel for the Petitioner (Hy-Lan) consented to the summary jurisdiction of the Referee to hear and determine the matters set out in the Trustee's petition and all parties (including Hy-Lan's counsel) agreed that Petitioner (Hy-Lan) would have two weeks to submit a further "Proof of Claim". (page A-2, Appendix to Appellant's Brief before the Court of Appeals). At Hy-Lan's request the Referee later granted a two weeks extension—to May 21, 1963 (page A-22, Appendix to Appellant's Brief before the Court of Appeals). Petitioner (Hy-Lan) filed no further proof of claim within the time agreed upon by Petitioner's counsel, or within the time as extended by the Referee. On May 25, 1963, the Referee entered judgment for the Trustee (page A-4, Appendix to Appellant's Brief before the Court of Appeals). On June 12, 1963, Petitioner filed a "Proof of Claim" for $409,077.78. On June 14, 1963, Petitioner moved to have the judgment set aside. The Referee heard the motion July 15, 1963 (page A-21, Appendix to Appellant's Brief before the Court of Appeals), and on July 16, 1963, entered an order disallowing the motion on the ground that Petitioner's "delay in filing additional proof of claim . . . was without legal

justification or excuse"; that to excuse the delay, set aside the judgment, and to permit further delays and hearings would unduly delay the administration and settlement of the bankrupt estates; and that Petitioner had not filed its petition for review within ten days as required under Section 39c of the Bankruptcy Act. (Page A-33, Appendix to Appellant's Brief before the Court of Appeals). Petitioner then filed a Petition for Review with the United States District Court, where the matter was heard before the Honorable J. B. Craven, Jr., on October 23, 1963. Two things made very clear at this hearing were: (1) Judge Craven would not hesitate to set aside the Referee's judgment if there was any indication that Petitioner had a meritorious claim, and (2) Petitioner wanted the Court to consider the January 2, 1963, letters as Proofs of Claim.

Even though the issue properly before the United States District Court on the appeal from the Referee was whether or not the Referee had abused his discretion or had misapplied the law, Chief Judge Craven made it clear that the court would not permit the Referee's judgment to stand, no matter how procedurally correct, if it was prejudicial to Hy-Lan, or if Hy-Lan did in fact have a bona fide claim.

Transcript of Proceedings, U. S. District Court, Western District of North Carolina, Charlotte Division, Civil #1601 (October 23, 1963), page 41 shows:

> "COURT: . . . the rule, as I recall it, on setting aside a default judgment is that before it can be set aside the Court must find that there is a meritorious claim. That's why I'm bringing this up. . . . In other words, *if I get convinced that anybody has a good, meritorious*

claim and that it's a just claim, I have no hesitation in saying that I'm in favor of setting aside the judgment." (Emphasis added)

The Court questioned Hy-Lan's attorney extensively to learn if, in fact, Hy-Lan did have a legal or meritorious claim, capable of proof or liquidation, which would be prejudiced if the "default judgment" of the Referee against Hy-Lan were sustained.

And on page 46 of the Transcript of Proceedings (October 23, 1963), *supra*:

> "COURT: . . . To me the heart of it is whether or not there is really any just claim." (Referring to Hy-Lan's claim)
>
> MR. BRADY: (Hy-Lan) Well, Your Honor, I didn't come here today to . . .
>
> COURT: (interrupting) I don't mean to adjudicate the claim finally but there ought to be a prima facie showing of a just claim or there is no excuse for setting aside the judgment.
>
> MR. BRADY: Well, the referee himself claims that the letters in January, 1963, were claims and what better right have we got than the referee's entry that they were claims? . . .
>
> COURT: I don't think you understand yet what I mean. There is quite a difference between filing a claim which may or may not be frivolous and filing a claim that is prima facie a just claim. To be sure, we can't finally adjudicate today.

And, again the Court said: (Page 47, *Transcript of Proceedings* [Oct. 23, 1963] *supra*):

> "COURT: I'll try putting it another way. As a matter of common sense . . . no Court in its right mind is going to set aside a default judgment when it knows that the claim asserted is simply a frivolous claim with no foundation whatsoever. That's just common sense."

In taking the matter under advisement, the Court requested, and was furnished, a copy of the "Proof of Claim" filed by Petitioner with the Referee on June 12, 1963.

With respect to whether or not the letters were proofs of claim, the proceedings show the following:

> "MR. BRADY: (page 46, Transcript of Proceedings [Oct. 23, 1963] supra) . . . Are we going to say here today, Your Honor, that the Honorable Sample is wrong and the letters of January weren't claims?
>
> COURT: (page 50) Let me relieve your mind. I have no doubt (but) that you want the Court to treat these letters as proofs of claim, do you not?
>
> "MR. BRADY (Hy-Lan): Right.
>
> COURT: I have no doubt about that. The referee treated them that way, you've treated them that way; everybody acquiesced that they were to be treated as proofs of claim. As far as procedure, there's no question about that."

Following the October 23, 1963, hearing, Judge Craven rendered his opinion on November 5, 1963—and entered

an order December 12, 1963—denying Petitioner's motion and affirming the order of the Referee (page 1, Appendix to Petitioner's Petition for Writ of Certiorari filed with the Supreme Court).

On appeal to the Court of Appeals, Petitioner stated, in its brief, that:

> "The issue on this Appeal is as follows:
>
> 1. Where an attorney for a party in a bankruptcy proceeding mistakenly believes that he has been granted further time to perform an act on behalf of his client and as a result defaults in meeting the deadline set by a Referee, should the judgment entered against the attorney's client be allowed to stand, particularly where the defaulting client has posted a full bond to protect the bankrupt's estate against loss?"

This was the only issue presented in Appellant's Brief (page 2, Appellant's Brief). Under this issue the Petitioner made two points:

> Point I (page 5 of Appellant's Brief):
>
> The Appellant should not have been deprived of its opportunity to file a formal proof of claim, *by reason of its attorney's misunderstanding as to the date of the extension granted by the Referee.*" (emphasis added)
>
> Point II. (page 7 of Appellant's Brief):
>
> "The bankrupts' estate would not be adversely affected if the time within which to file the proof of claim *was reopened.*" (emphasis added)

The basic question throughout was whether or not there was an abuse of discretion. The District Court sustained the action of the Referee. The Court of Appeals sustained the judgment of the District Court—it found that the District Judge properly affirmed the order of the Referee, and, further, that he "did not abuse his discretion by denying Hy-Lan's motion to vacate the Referee's order and to re-open the proceedings for further proof." (page 1, Appendix to Petitioner's Petition for Writ of Certiorari). Incidentally, on its appeal to the Court of Appeals, Petitioner had grossly abused the Court's rule prescribing the time within which briefs must be filed, and the Court could have very easily granted the Trustee's motion to dismiss the appeal on that ground, but it elected to afford the Petitioner a full hearing and to render its decision on the merits.

Following the decision of the Court of Appeals on April 20, 1964, Petitioner filed a petition for re-hearing on May 19, 1964. The Court of Appeals readily denied the petition for rehearing, pointing out that it sought "to recast the issues which were raised below and which were presented before us on appeal." (Appendix page 1 Petitioner's Petition for Writ of Certiorari).

ARGUMENT

1. *The questions presented by Petitioner were not the questions before the Court of Appeals, nor are they properly before the Supreme Court.*

Petitioner states that the "Question Presented" is whether or not the two letters of January 2, 1963, can constitute proofs of claim in these proceedings; and, if not, may the Referee limit the time for filing proof of claim to less than six months.

As pointed out in the statement of the case, above, the letters were treated as proofs of claim by the Referee, *the Petitioner*, the Respondent, and the Court. Their status as proofs of claim was not a question presented by Petitioner before Judge Craven; on the contrary, it was made very clear before Judge Craven that the Petitioner wanted them to be treated as proofs of claim—and they had been so treated.

Surely a litigant will not be permitted to gain the audience of the Supreme Court of the United States by fashioning a question in its petition for writ of certiorari which it conceded to be no question in the United States District Court and which it did not present in its Appellant's Brief on appeal to the Court of Appeals. (Petitioner's only attempt on appeal to assert that the letters were not proofs of claim was in its "reply brief"—after Respondent [appellee] had pointed out to the Court those things which were *not* at issue before the Court of Appeals).

2. There is no special or important reason for granting a writ of certiorari in this case.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. (Supreme Court Rule 19).

The Petitioner had presented contingent, unliquidated claims to the Referee, and had refused to pay the $41,911.63 claim owed by Petitioner to the bankrupts. To expedite the administration of the bankrupts' estate, the Trustee sought to have both matters determined by the Referee. *The Petitioner agreed to the summary jurisdiction of the Referee to determine both matters, and agreed to a time limit of two weeks within which to file further Proof of Claim* (Page A-2, Appendix to Appellant's Brief before the Court of Appeals). Thereafter, on Petitioner's request, the Referee extended the time two weeks—to May 21, 1963—but Petitioner failed to file any further proof of claim within either the time agreed upon, or as extended for it by the Referee.

Petitioner gives as its reason why the writ should be granted (page 5 of Petition for Writ of Certiorari):

> "The issue is clearly one of importance in the administration of the Bankruptcy Act. Settlement of the question is plainly in the public interest *as it is likely to arise in every case in which a debtor in a Chapter XI arrangement subsequently is adjudged a bankrupt*" (emphasis added)

Respondent respectfully submits that such is not the case. If "the issue" is whether the letters constitute proofs of claim—this issue is not properly presented on the record—especially where all parties, the Referee and the Judge have agreed that they shall be treated as proofs of claim. If "the issue" is whether the Petitioner was allowed the proper time to file proofs of claim—this issue is not properly presented on this record. Petitioner agreed to both the

summary jurisdiction of the Referee and to the time which it would have to file any further proof of claim. Furthermore, this involved contingent, unliquidated claims under Sec. 57(d) [11 USCA §93(d)] of the Bankruptcy Act, which the petitioner failed to liquidate or estimate in the manner and within the time directed by the Referee (and agreed to by the Petitioner).

Far from being "likely to arise in every case in which a debtor in a Chapter XI arrangement subsequently is adjudged a bankrupt", the Respondent Trustee earnestly submits that the issues contended for by Petitioner would never arise in any case where a claimant complied with the orders of the Referee, consented to by the claimant.

While exhaustively pursuing a variety of positions which change from one Court to the next, and even from one brief to the next before the same Court, and which appear to the Respondent to be completely untenable, the Petitioner completely ignores the delay, expense and injustice being imposed upon the creditors of the bankrupts who must await the final termination of this litigation before the bankrupts' estate can be finally administered and distributed.

The Petitioner, after being afforded ample opportunity to substantiate its alleged claims, but completely failing to do so, has pursued its series of motions for review, appeals, petition for rehearing and now this petition for writ of certiorari. In the meantime the plant of the bankrupts has been bought by the Petitioner, or an affiliate, and the officers and employees of the bankrupts have been employed by the Petitioner, or its affiliate, or have moved away, or died. The

president of the bankrupts (Mr. Jules Bachrach), with whom the alleged agreement was made about bedroom furniture, has since died.

No sound reason for the granting of certiorari has been advanced. On the other hand, equity and the orderly administration of justice require that the petition for writ of certiorari be denied, that this case be put at rest, that the stay of execution be lifted, that the Trustee be permitted to proceed with the enforcement and collection of his judgment against the Petitioner, and thence proceed with the final distribution and settlement of bankrupts' estate.

CONCLUSION

For the reasons stated the Respondent (Trustee) urges that the Petition for Writ of Certiorari be denied.

Dated November 13, 1964.

Respectfully submitted.

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CERTIFICATE OF MAILING

Copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Hy-Lan Furniture Company, Inc., Petitioner, by mailing the same, first class postage prepaid, to Robert Cantor, 1137 Mutual Building, Richmond Virginia, and Robert R. Jones, 1101 Mutual Building, Richmond, Virginia, counsel of record for Hy-Lan Furniture Company, Inc., on the 13th day of November, 1964.

THOMAS J. WILSON
W. F. WOMBLE